No. 14742.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MITSUGI NISHIKAWA,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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Statement of Pleadings and Facts Disclosing Jurisdiction.

The complaint [R. 3] was filed pursuant to Section 503 of the Nationality Act of 1940 (8 U. S. C. (1946 Ed.) 903; 54 Stat. 1171)[1] giving the District Court for the Southern District of California, in which appellant claimed permanent residence [R. 3], jurisdiction over an action for a declaration that a person who has been denied a right or privilege as a national of the United States [R. 4] is a national of the United States.

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[1]Preserved by the Savings Clause, Section 405a of the Immigration and Nationality Act of 1952; note to 8 U. S. C. 1101; 66 Stat. 280.

This is an appeal from a judgment entered by the District Court [R. 14-15] adjudging that appellant, who was born in the United States [R. 14], lost his United States citizenship by serving in the Japanese Army, and denying appellant's prayer for judgment that he is a national of the United States. [R. 15.]

This court has jurisdiction of the appeal under the provisions of 28 U. S. C. 1291 and 1294(1).

Statement of the Case.

Statutes.

8 U. S. C. 801(c) provides in pertinent part:

> "A person who is a national of the United States . . . by birth . . ., shall lose his nationality by:
>
> (c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state;"

Section 1 of the 14th Amendment to the United States Constitution provides in pertinent part:

> "All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . ."

The Fifth Amendment provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Facts.

Appellant was born in Artesia, California on April 20, 1916 [R. 10]. He was thus by United States law (14th Amendment) and by Japanese law [R. 34] a citizen of both countries by birth.[2] Until he went to Japan in August, 1939 [R. 18], appellant lived all of his life in the United States and was educated in the schools in the United States [R. 18]. In 1939 appellant went to Japan in order to visit and study, intending to remain between two to five years [R. 26]. His mother and father remained in the United States [R. 29, 30]. He travelled on an American, not a Japanese, passport [R. 39-40].[3]

When he got to Japan, appellant started to study under a tutor in Japanese language [R. 35], he not being able to read Japanese characters [R. 29], but when his father died in November, 1939 [R. 35], he had no funds and so had to go to work (*Ibid*). Around June, 1940, pursuant to the Japanese compulsory military conscription law [R. 22, 23] he was required to take a physical examination

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[2]There is no evidence in the record as to the nationality law of Japan nor as to any of the facts necessary to make one a Japanese national under Japanese law. Save for appellant's own testimony that he was a national of Japan [R. 34], admittedly a conclusion, there is no evidence in the record to support an indispensable element of appellee's case, namely, that appellant had, or acquired Japanese nationality. (8 U. S. C. 801(c).) However, despite the fact that foreign law is a question of fact which must be proved (*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 9 S. Ct. 469, 32 L. Ed. 788) appellant agrees that he was born of a Japanese father and therefore, under Japanese law (Art. I, Japanese Nationality Law; Law No. 66 of 1899, as amended by Law No. 27 of 1916 and Law No. 19 of 1924) was a national of Japan.

[3]The trial court refused to admit the passport application, which showed on its face that Passport No. 44632, San Francisco Series, was issued to appellant, into evidence [R. 41]. Under *Fong Wong Jing v. Dulles*, 349 U.S. 941, this was error.

[R. 18] and on March 1, 1941, pursuant to the same law, he was drafted into the army (*Ibid*).

When he received the notices to report for physical examination and to report for induction, he was afraid not to comply because he heard rumors that the Kempei Tei[4] would throw persons who tried to dodge the draft into prison [R. 37], or beat them [R. 47] and he even heard of one case of a boy who was bayoneted by them and killed [R. 37].

At the time here involved, the government of Japan was tyrannical and despotic, with the military controlling the country. Appellant testified to this condition pointing out that even high officials were killed in their homes [R. 37]. The police made monthly checks of the boarding house where appellant lives [R. 44].[5]

The tyranny extant in Japan during this time is a matter of such common knowledge that this court can take judicial notice thereof.[6] It was under these circumstances that appellant obeyed the Japanese law.

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[4]The Kempei Tei were the dreaded Japanese military police which held the people in Japan generally in fear. See *Kanno v. Acheson,* 92 F. Supp. 183, 184 (D.C. S.D. Cal., 1950); *Kato v. Acheson,* 94 F. Supp. 415, 416 (D.C. S.D. Cal., 1950). And *cf. Fukumoto v. Dulles,* 216 F. 2d 553, 555 (C.A. 9, 1955) and the Murayama deposition therein referred to.

[5]*Cf.* Page 3, Murayama deposition in *Fukumoto v. Dulles,* 216 F. 2d 553, detailing the surveillance under which Nisei were kept by the police.

[6]For the purpose of aiding the court in its judicial knowledge, we have lodged with the clerk of this court certain documents the contents of which this court can take judicial notice. These documents are:

1. "Education in the New Japan," published by Supreme Commander for the Allied Powers (SCAP), Civil Information and Education Section, Tokyo, 1948;

While in the army, appellant was asked by non-commissioned officers, because he was born and raised in the United States, what he thought would be the outcome of the war [R. 38]. He replied that "there wouldn't be any chance of Japan winning the war at all." [R. 38.] For this indiscretion, he "was called up by the enlisted personnel of higher rank and . . . given a thorough beating." (*Ibid.*) After that he was beaten about every day for a month and a couple days each month following. (*Ibid.*) While he was in the army, his nickname was "America." (*Ibid.*) He was discharged at the end of the war [R. 19].

After the war, appellant was denied a passport to return to the United States by the American Consulate at Yokohama on the ground that he had lost his United States citizenship by reason of his service in the Japanese Army [R. 12].

Hence this law suit.

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2. SCAP, Summation of Non-Military Activities in Japan and Korea, No. 3, December, 1945;

3. SCAP, Summation No. 1, September-October, 1945;

4. SCAP, Two Years of Occupation, Tokyo, 1947;

5. SCAP, A Brief Progress Report on the Political Reorientation of Japan, Tokyo, 1949;

6. Deposition of Kiyoshi Togosaki;

7. Deposition of Tamotsu Murayama;

8. Deposition of Hidemitsu Matsuki.

Some, or all, of these documents were introduced and received in evidence in numerous cases involving the issues of this case. *E. g. Kato v. Acheson,* 94 F. Supp. 415 (D.C. S.D. Cal., 1950); *Kanno v. Acheson,* 92 F. Supp. 183 (D.C. S.D. Cal., 1950); *Yoshida v. Dulles,* 116 F. Supp. 618 (D. C. D. Haw., 1954).

As to the official publications of SCAP (items 1 through 5), it is clear that this court may take judicial notice of their contents by reason of that fact alone. As to the depositions (items 6-8), they being part of the records of the district courts of this circuit (and having been admitted into evidence usually without objection; the

Questions Involved.

1. Did the Government carry its burden, whether that burden be to show the expatriation of this American born citizen by clear, convincing, unambiguous evidence to have been voluntary, or whether its burden was to overcome the presumption that appellant's military service was involuntary by reason of his having been drafted into the Japanese Army pursuant to the compulsory Japanese Military Service Law? And, irrespective of what the Government's burden may be, was appellant's military service voluntary?

Mitsuki deposition, indeed, being taken by the Government) notice may be taken thereof as well. These principles are substantiated in the following cases:

N. L. R. B. v. E. C. Atkins Co., 331 U.S. 398, 406, where the Supreme Court took judicial notice of the contents of a circular issued by Headquarters, Army Service Forces. The court said:

> "Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it. *Standard Oil Co. v. Johnson,* 316 US 481, 483, 484."

Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 375, where the court took judicial notice of a practice in the administrative office of the United States courts; *Tempel v. United States,* 248 U.S. 121, 126, where the court took judicial notice of the contents of reports of the Secretary of War. In *Standard Oil Co. v. Johnson,* 316 U.S. 481, 483, 484, the court took judicial notice of an order of Army Headquarters establishing post exchanges.

That this is the view of the Government is seen from its brief in *Hirabayashi v. United States,* 320 U.S. 81, where at page 11 it is said that "facts (appearing) in official documents . . . are peculiarly within the realm of judicial notice" citing innumerable cases.

See also as to the right to notice the facts revealed by the records of the District Court: *Savage v. U. S. District Court,* 144 F. 2d 575 (C.C.A. 9, 1944); *Armstrong v. Alliance Trust Co.,* 126 F. 2d 164, 167 (C.C.A. 5, 1942)). And compare *Falbo v. United States,* 320 U.S. 549, 553, f.n. 7.

2. Should 8 U. S. C. 801(c) be interpreted so as to impose expatriation upon native born citizen under the facts of this case—namely, obedience to the laws of a foreign country by a citizen of that country temporarily residing therein?

3. On its face, and as applied in this case, is 8 U. S. C. 801(c) constitutional under the citizenship clause of the 14th Amendment and under the due process clause of the 5th Amendment?

Specification of Errors.

I. The trial court erred in giving judgment for the appellee [R. 15];

2. The trial court erred in failing to adjudge that appellant is a national of the United States and that he did not lose that nationality by reason of his having served in the Japanese Army [R. 15];

3. The trial court erred in finding [III; R. 11] that when appellant journey to Japan in 1939, he knew at that time he was likely to be called for military service in the Japanese Armed Forces. There is no evidence in the record to support this finding, the finding is not supported by the evidence, and it is clearly erroneous.

4. The trial court erred in finding [VII; R. 12] that it is not true that appellant's service in the Japanese Army was the result of coercion and was not his free and voluntary act. There is no evidence in the record to support this finding, the finding is not supported by the evidence and it is clearly erroneous;

5. The trial court erred in finding [VIII; R. 12] that appellant's entry and service in the Japanese Armed Forces was his free and voluntary act. There is no evidence in the record to support this finding. The finding is not supported by the evidence and it is clearly erroneous;

6. The court erred in its conclusion [III; R. 13] that appellant lost his nationality under Section 401(c) of the Nationality Act of 1940. Appellant's act was not voluntary; hence it could not be expatriating. But even if appellant's act was voluntary, the section, as applied to the facts of this case—a dual citizen obeying the law of the country in which he is—should be construed so as not to apply, in order to avoid unconstitutionality. If applied to this case, it is unconstitutional under the 5th and 14th Amendments, as well as so unconstitutional on its face.

7. The court erred in refusing to admit into evidence [R. 41] plaintiff's exhibit 3 for identification [R. 39-40]. The grounds urged at the trial for the objection were "that the document is a statement made by the plaintiff at some future time and is self-serving and immaterial and irrelevant." [R. 41.] The full substance of the evidence rejected is the passport application of appellant just before he went to Japan in 1939 and showing thereon that an American passport was issued to him by the United States Department of State.

8. The court erred in ruling [R. 59] that 8 U. S. C. 801(c) is constitutional.

ARGUMENT.

Preliminary Statement.

Under any view of the facts or law, the decision below is erroneous. It is completely out of line with a vast body of cases dealing with purported loss of citizenship under Section 401(c), as well as with decisions of this court on related matters (*e. g., Fukumoto v. Dulles,* 216 F. 2d 553), and most recently, of the United States Supreme Court (*e. g., Gonzales v. Landon,* No. 111, Oct. Term 1955, 24 L. W. 3164, 100 L. Ed. (Adv. Op.) 136).

Summary of Argument.

1. There can be no expatriation from American citizenship unless the citizen acts voluntarily. In cases such as these the Government's burden is to show such conduct by evidence that is clear and convincing and not such as to leave the issue in doubt. Such evidence the Government did not produce here. Indeed, in this case, the Government introduced no evidence whatsoever. At the least, the Government's burden is to overcome the presumption that appellant acted involuntarily. Since appellant was drafted into the Japanese Army pursuant to law, the presumption is that his service was involuntary. Accordingly, judgment must be for the citizen since the government produced no evidence overcoming the presumption. In any event, on the ordinary burden of proof, appeallant showed his service to have been involuntary. The trial court's holding to the contrary is clearly erroneous.

2. Following accepted principles, the statute involved in this case should be so construed as to avoid a constitutional issue. Since appellant had Japanese nationality, resided in Japan at the time and acted pursuant to the law of the country in which he was residing, Section 401(c) should not be construed to apply to such facts. If the statute is construed to apply to such facts, it is unconstitutional because Congress has no power to take away constitutionally endowed citizenship absent consent of the citizen with knowledge of the consequences.

I.

Appellee Did Not Meet the Burden Required of Him in Order to Take Away Appellant's United States Citizenship.

A. In Order to Take Away One's United States Citizenship, the Burden Is Upon the Government to Prove by Clear, Convincing and Unequivocal Evidence All the Elements of Expatriation.

This court has expressed itself, on a number of occasions on the general question of expatriation from United States citizenship. (See, *e. g., Acheson v. Murakami,* 176 F. 2d 953; *McGrath v. Abo,* 186 F. 2d 766; *Fukumoto v. Dulles,* 216 F. 2d 553; *Kawakita v. United States,* 190 F. 2d 506, aff'd 343 U.S. 717; *Takehara v. Dulles,* 205 F. 2d 560; *Attorney General v. Ricketts,* 165 F. 2d 193.) From these and other cases these principles emerge: there can be no expatriation unless there is a voluntary renunciation or abandonment of nationality; citizenship is a precious right that cannot be lightly taken away; ambiguous or equivocal conduct is not sufficient to cause loss of citizenship; United States citizenship is not to be taken away or deemed forfeited except in the

clearest cases; the evidence in this regard must be clear, unequivocal and convincing, and not by a mere preponderance which leaves the issue in doubt. (*Cf. Perkins v. Elg,* 307 U.S. 325; *Gonzales v. Landon,* No. 111, U.S. Sup Ct., Oct. Term, 1955, 24 L.W. 3164; *Dos Reis, ex rel. Camara v. Nicolls,* 161 F. 2d 860 (C.C.A. 1, 1947); *Podea v. Acheson,* 179 F. 2d 306 (C.A. 2d, 1950); *Schneiderman v. United States,* 320 U. S. 118, 125; *Baumgartner v. United States,* 332 U.S. 665, 670; *Mandoli v. Acheson,* 344 U.S. 133, 193; *Acheson v. Maenza,* 202 F. 2d 453 (C.A. D.C., 1954); *Monaco v. Dulles,* 210 F. 2d 769 (C.A. 2, 1954).)

This means that the Government must show, and by the strict standard of proof required, not only that the citizen performed the physical acts denounced by the expatriating statute,[7] but also, and by the same heavy degree of proof, that other all important element: that he did so voluntarily. It is the Government's burden, when it seeks the immense forfeiture it does here, to prove voluntary conduct, rather than the citizen's burden to prove involuntary conduct. (*Augello v. Dulles,* 220 F. 2d 344, 345 (C.A. 2, 1955); *Lehmann v. Acheson,* 206 F. 2d 592, 598 (C.A. 3, 1953); *Schioler v. Secretary of State,* 175 F. 2d 402, 403 (C.A. 7, 1949); *Gonzales v. Landon,* 24 L.W. 3164.) That the Government followed the incorrect view of the law on this point is seen from the fact that it introduced not one single shred of evidence in the case, thus obviously being content to rest on the theory that *appellant* did not prove his case. That the court

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[7]Here, that he served in the armed forces of a foreign state and had the nationality of that state; two elements which are not in dispute.

below fell into the same error is seen from the fact that as soon as appellant had rested, the court immediately asked Government counsel whether he rested [R. 49] to which an affirmative reply was made [R. 50].

This circuit has not directly passed upon the question. In *Attorney General v. Ricketts,* 165 F. 2d 193, 195, this court would not permit expatriation based upon equivocal conduct. In *Fukumoto v. Dulles,* 216 F. 2d 553, the appellant there urged the point upon this court (216 F. 2d at 554). This court did not reach the question, however, because it held that on the ordinary burden of proof the appellant had shown that he had acted involuntarily.[8] Accordingly it reversed on the facts because the trial court "had no proper realization of what motivation drove Fukumoto to apply for Japanese citizenship." (216 F. 2d at 555.)

However, last month, in *Gonzales v. Landon,* No. 111, Oct. Term 1955, ...U.S....., 24 Law Week 3164, the Supreme Court, reversing this court's decision in the case (215 F. 2d 955), settled the question in favor of appellant. The Supreme Court's *per curiam* opinion is as follows:

> ". . . The Court is of the view that the standard of proof required in denaturalizations cases (see Schneiderman v. United States, 320 U.S. 118; Baumgartner v. United States, 322 U.S. 665) is applicable to expatriation cases arising under §401(j) of the Nationality Act of 1940, 54 Stat. 1137 as amended

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[8]There the Government claimed expatriation under 8 U. S. C. 801(a) where the citizen had actually become a naturalized Japanese citizen or, at least re-acquired Japanese nationality which he formerly had had.

and has not been satisfied in this case. Accordingly the judgment below is reversed without reaching the constitutional questions that have been presented."

An examination of the briefs in the *Gonzales* case discloses extensive briefing of the very question as to the necessity for the Government proving the conduct to be voluntary, and whether the Government had so proved by the strict standard of proof required. As seen, the Supreme Court held the burden to be on the Government and that it had not been met.

It is true that the *Gonzales* case, and the Supreme Court's decision, dealt only with Subsection (j) of Section 401 of the Nationality Act of 1940. But there is no basis in logic, and certainly not in law, for allowing the Government to expatriate a citizen under subsection (c) on any lesser degree of proof. Under no view or provision of law can there be expatriation unless the conduct is voluntary.[9] And by *Gonzales* the Supreme Court has made it clear that the burden of proof of this element as well lies with the Government and by evidence that is clear, convincing, unequivocal and leaving no troubling doubts.

That the Government failed in the case at bar to prove its case is, we believe, clear beyond peradventure of doubt.

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[9]So held by this circuit under subsections (a)(e) and (i) of 8 U. S. C. 801; (*Fukumoto v. Dulles,* 216 F. 2d 553; *Attorney General v. Ricketts,* 165 F. 2d 193; *Takehara v. Dulles,* 205 F. 2d 560; *Acheson v. Murakami,* 176 F. 2d 953; *McGrath v. Abo,* 186 F. 2d 766) and by the United States Supreme Courts and the Circuit Courts of the First, Second and Third Circuits and of the District of Columbia under subsection (c) involved in this case. (*Mandoli v. Acheson,* 344 U.S. 133; *Dos Reis ex rel. Camera v. Nicolls,* 161 F. 2d 860; *Augello v. Dulles,* 220 F. 2d 344; *Lehmann v. Acheson,* 206 F. 2d 592; *Acheson v. Maenza,* 202 F. 2d 453.)

In this case, indeed, as noted, the Government produced no proof at all, to say nothing of its having produced evidence of the convincing nature required.

B. On the Ordinary Burden of Proof, Even If Appellant Had One Here, His Service in the Japanese Army Was Involuntary.

(1)

MILITARY SERVICE BY REASON OF CONSCRIPTION, CREATES A REBUTTABLE PRESUMPTION OF INVOLUNTARINESS. APPELLEE DID NOT OVERCOME THIS PRESUMPTION.

There is no dispute about the fact that appellant was drafted in the Japanese Army [R. 18, 56, 57] under the compulsory military service law which provided criminal penalties for violation thereof [R. 22-23]. The law, under this state of facts is that, at the very least, the entry and service in the army creates a rebuttable presumption of involuntariness, and, since the appellee did not overcome this presumption, entitles appellant to judgment.

In *Lehmann v. Acheson,* 206 F. 2d 592, 594 (C.A. 3, 1953), the court said:

> "Conscription into the Army of a foreign government of one holding dual citizenship is sufficient to establish *prima facie* that his entry and service were involuntary . . .
>
> "Upon consideration of the record we are of the opinion that the District Court erred in its determination that Lehmann had expatriated himself from United States citizenship. The Government has failed to rebut the presumption that his entry and service in the Swiss Army as a result of his conscription were involuntary."

Accord:

Perri v. Dulles, 206 F. 2d 506 (C.A. 3, 1953);
Augello v. Dulles, 220 F. 2d 334 (C.A. 2, 1955).

These cases are doubly important because they reversed trial courts which had found for the Government factually on the issue of duress.

This concept in different language had previously been concurred in by the Attorney General in his opinion (41 Ops. Atty. Genl. No. 16), quoted from and approved by the Supreme Court in *Mandoli v. Acheson,* 344 U.S. 133, 135. In another part of this opinion, the Attorney General said:

> ". . . Generally, it may be assumed that an act performed under legal compulsion lacks the voluntariness of choice that is essential to accomplish expatriation . . ."

Noting the anomalous position of the Government in the *Lehmann* case as compared with its concession in the *Mandoli* case, 344 U.S. 133,[10] the court said (206 F. 2d 599):

> "We can see no valid reason for making any distinction between service by conscription in the Swiss Army, for in both instances the conscript acts under compulsion of law and the duress sanctions in the event of non-compliance."

In *Adams v. Maryland,* 347 U.S. 179, the United States Supreme Court affirmed, in effect, what the Court of Appeals had said in the *Lehmann* and *Perri* cases. In the *Adams* case the Supreme Court recognized that one

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[10]With which the Supreme Court agreed: "The choice of taking the oath or violating the law was, for a soldier in the army of Fascist Italy, no choice at all." (344 U.S. at 135.)

who appeared before a Senate investigating committee by virtue of having been subpoenaed did not act voluntarily. The court said (347 U.S. at 181):

> ". . . He was not a volunteer. He was summoned. Had he not appeared he could have been fined and sent to jail."

This court in *McGrath v. Abo,* 186 F. 2d 766, 772, held, in a factual situation not dissimilar to the case at bar (*Cf. Fukumoto v. Dulles,* 216 F. 2d 553, 555) that

> ". . . a rebuttable presumption arises as to those confined at Tule Lake that their acts of renunciation were involuntary."

Accordingly, we submit, that as a matter of law, since appellee failed to overcome the presumption of involuntariness, appellant is entitled to a reversal.

(2)

EVEN WITHOUT THE PRESUMPTION, APPELLANT ESTABLISHED THAT HIS SERVICE WAS INVOLUNTARY. THE TRIAL COURT'S FAILURE TO SO HOLD WAS CLEARLY ERRONEOUS.

The evidence is that, not only did appellant respond to the draft call because required to do so by law, but that he feared drastic treatment at the hands of the Kempei Tei if he failed to so do [R. 37, 47]. This evidence, when viewed against the background of totalitarian, militaristic, tyrannical Japan,[11] shows coercion and compulsion

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[11]We have set out in Appendix "A" a few excerpts from official and other authoritative accounts of the nature of Japan at the time here involved. Fuller extracts have been lodged with the clerk of this court. (See footnote 6, *supra.*) This court can take judicial notice of their contents. (*N. L. R. B. v. E. C. Atkins Co.,* 331 U.S. 398, 406; *Standard Oil Co. v. Johnson,* 316 U.S. 481, 483, 484; *Tempel v. United States,* 248 U.S. 121, 126; *Stainback*

of the strongest nature,[12] and courts which have considered the matter in similar cases have so recognized.

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v. Mo Hock Ke Lok Po, 336 U.S. 368, 375; page 11 of brief for Government in *Hirabayashi v. United States,* 320 U.S. 81; *Maritime Union v. Herzog,* 78 F. Supp. 146 (D.C. D.C., 1948), aff'd 334 U.S. 854:

> "We judicially know the facts of current history and cannot close our eyes to them and to their significance."

United States v. Kusche, 56 F. Supp. 201, 206 (D.C. S.D. Cal., 1944):

> "A proposition which is common knowledge, and of which the court can take judicial notice, viz., that when Hitler came to power in 1933 he suspended the personal liberty provisions of that Constitution and thereupon and thereafter he established an absolute dictatorship based upon the tenets of national socialism."

Other cases in accord are: *Ex parte Milligan,* 4 Wall. (U.S.) 2, 18 L. Ed. 281, 296 (that the federal authority in Indiana was always unopposed); *The Appollon,* 9 Wheat. (U.S.) 362, 374, 6 L. Ed. 111, 114 (that smugglers infested that particular area); *Ponce v. Roman Catholic Church,* 210 U.S. 296, 309 (of the history of Porto Rico and its legal and political institutions up to the time of its annexation by the United States); *DeWitt v. Wilcox,* 161 F. 2d 787 (C.C.A. 9, 1947), cert. den. 332 U.S. 763 (military problems facing General DeWitt during the war); *Ex parte Zimmerman,* 132 F. 2d 442, 445 (C.C.A. 9, 1952), cert. den., 319 U.S. 744) (that the Hawaiian Islands and the Pacific area of the United States were faced with an imminent threat of invasion at the beginning of the war); *Hunter v. Wade,* 169 F. 2d 973, 976 (C.A. 10, 1948), aff'd 336 U.S. 634, reh. den. 337 U.S. 921) (that during the war in Europe the United States armed forces were moving rapidly and conditions in the field were fluid); *In re Bush,* 84 F. Supp. 873 (D.C. D.C., 1949) (that on the surrender of Japan the American armed forces occupied Japan); *Gualtieri v. Sperry Gyroscope Co., Inc.,* 67 F. Supp. 219, 221 (D.C. E.D. N.Y., 1946) (of industrial condition which existed in the nation during the period immediately before the war and during the war); *Tidmore v. Mills,* 32 So. 2d 769, 777 (Court App. Ala., cert. den. 32 So. 2d 782); *Atchison, T. & S. F. R. Co. v. United States,* 284 U.S. 248, 260; *Skendzel v. Rose Manor Realty Co.,* 80 F. Supp. 619, 622 (D.C. E.D. Wisc., 1948); *The Pietra Campanella,* 73 F. Supp. 18, 27 (D.C. D. Md., 1947).

[12] *Cf. Acheson v. Maenza,* 202 F. 2d 453, 459 (C.A. D.C., 1953): "That testimony must be considered in connection with the well-known ruthlessness of the Fascist regime which, even as early as 1935, would hardly have tolerated resistance to its draft laws by an admitted national of Italy."

In *Kanno v. Acheson,* 92 F. Supp. 183 (D.C. S.C. Cal. 1950), the court said:

> "For some years prior to Pearl Harbor and until the surrender of Japan in 1945, Japan and its people were under the control of the military authorities of Japan, and the Secret or Thought Police, and the Special Higher Police; and during that period the people of Japan were generally in fear of them and particularly in fear of physical punishment, from the Japanese military authorities, the Secret Police and the Special Higher Police."

In *Kato v. Acheson,* 94 F. Supp. 415, 416 (D.C. S.D. Cal., 1950), it was said:

> ". . . the plaintiff, and other young American-born Japanese, before the war was on and thereafter, found themselves in an atmosphere in Jpan of being dominated by a cruel and unjust military government although they had only gone to Japan to receive an education, and their desire and intention was to return to the United States, but were refused a passport. Their situation there is clearly reported as to such circumstances in the official report of General MacArthur to the United States after an investigation. He, after making an investigation, found that the military forces of Japan prior to and until Japan surrendered, ruthlessly and brutally dominated Japan regardless of the rights of all, and it is easy to ascertain the dominating atmosphere and situation this plaintiff and others were in which the military forces of Japan arbitrarily dominated."

In *Morizumi v. Acheson,* 101 F. Supp. 976, 977 (D.C. N.D. Cal., 1951):

> "It is clear that at the time petitioner was ordered to report for army duty in 1945, he had no reason-

able choice but to do so. Nor would it be reasonable to expect him to have protested, however abhorrent such service was to him. . . . In view of what is generally known of conditions in Japan, it is not likely that he would have escaped with merely a prison sentence."[13]

The Court of Appeals for the District of Columbia, in cases decided before the Supreme Court's decision in *Gonzales v. Landon,* apparently was of the view contrary to that of the Second and Third, and apparently, the Seventh Circuits, that on the issue of voluntariness, the burden of proof was on the plaintiff (See *Alata v. Dulles,* 221 F. 2d 52 (C.A. D.C. 1955).) Nevertheless in at least half a dozen cases it reversed trial courts which, on evidence substantially identical with that here, had held for the Government.

Alata v. Dulles, 221 F. 2d 52 (C.A. D.C. 1955);

Soccodato v. Dulles, 226 F. 2d 243 (C.A. D.C. 1955);

DeMarco v. Dulles, 26 Fed. 265 (C.A. D.C. 1955);

Becce v. Dulles, 226 F. 2d 265 (C.A. D.C. 1955) (2 cases);

Santi v. Dulles, 226 F. 2d 266 (C.A. D.C. 1955).

In these cases, and in *Acheson v. Maenza,* 202 F. 2d 453 (C.A. D.C. 1953), the District Columbia Court of Appeals recognized that the ruthless conditions in Fascist

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[13] *Cf.,* as to a similar situation in Italy, this admission by the Attorney General (41 Ops. Atty. Gen. No. 16), quoted and adopted by the Supreme Court in *Mandoli v. Acheson,* 344 U.S. 133, 135:

". . . 'The choice of taking the oath or violating the law was for a soldier in the Army of Fascist Italy no choice at all' . . ."

Italy, albeit each case must stand on its own facts, were such that service in the Italian Army under such conditions was not voluntary; "that the rule is strong that factual doubts are resolved in favor of citizenship" (221 F. 2d 52 at 54). See also *Monaco v. Dulles,* 210 F. 2d 760 (C.A. 2, 1954) and *Pandolfo v. Acheson,* 202 F. 2d 38 (C.A. 2, 1953).

This court has likewise recognized similar compulsions in *Fukumoto v. Dulles,* 216 F. 2d 553, where it reversed the trial court's finding of voluntary action because that court "had no proper realization of what motivation drove Fukumoto to apply for Japanese citizenship." (216 F. 2d at 555.)

The basis of the reasoning of the trial court in the instant case appears to be three-fold: (1) that appellant went to Japan himself when he was 23 years of age [R. 55]; *i. e.,* not, as in many other cases, going there as a young child; (2) that he took no steps to get out of the draft [R. 56]; (3) that he did not believe the testimony of appellant [R. 55] (The court said it would be "ridiculous" [R. 55] to believe it.) In addition, the court found [R. 11, 56] as a fact, based on absolutely not one bit of evidence in the record and in direct contradiction and disregard of the evidence [R. 25], that when appellant went to Japan, he knew he was likely to be called for military service and *wanted* to go into that service. All this, in the very teeth of the uncontradicted evidence that when appellant went to Japan, he did *not* know he was likely to be drafted in the Japanese Army [R. 25] coupled with the fact that both appellant's father and mother were in the United States when he went [R. 29, 30].

In relying upon the fact that appellant went to Japan in 1939 when he was 23 years of age (*ergo* he went "to do his duty as a Japanese national" [R. 55] [this of a boy who had lived all his life in the United States [R. 18], had been educated in the United States [R. 18], had left his parents in the United States [R. 29, 30] and could not read the Japanese language [R. 29]]!), the trial court did in reverse what this court condemned in *Takehara v. Dulles,* 205 F. 2d 560. In that case the trial court had held that *because* the plaintiff had lived most of his life in Japan, *therefore* when he voted he was simply acting as a Japanese and could not be said to have acted involuntarily. In the case at bar the trial court reasoned that because appellant had *not* lived in Japan all his life, *therefore* when he went to Japan he went "to do his duty as a Japanese national" [R. 55]. Not only is this reasoning error in law (*Takehara v. Dulles,* 205 F. 2d 560), but the conclusion is supported by not one single sentence, phrase, word or other scintilla of evidence in the record.

The second facet of the trial court's reasoning—that he didn't take steps to get out of the draft or to return to the United States—is likewise erroneous. This line of argument was effectively answered in *Lehmann v. Acheson,* 206 F. 2d 592, 596, where the court said:

> "An analysis of the District Court's opinion discloses that its determination was premised on acts of omission, rather than commission, on the part of Lehmann with respect to his service in the Swiss Army and attending circumstances.
>
> "The omissions enumerated in the opinion were:
>
> "(1) On his 1941 visit to the American consulate at Basel, Lehmann failed to furnish proof of his birth in the United States and failed to inquire how he could establish his American birth.

"(2) On that same visit he did not ask specifically for the protection of the American consulate and expressed no desire to register as an American citizen.

"(3) He did not protest at the time he entered the Swiss Army or at the time he took the oath of allegiance.

"With respect to these 'omissions' it need only be said that they were utterly irrelevant to the critical issue of 'voluntariness'."

The irrelevance of the argument is made the more apparent in *Monaco v. Dulles,* 210 Fed. 760 (C.A. 2, 1954), where the plaintiff in that case actually "ignored the warning of the State Department, made in response to Italian laws of dual nationality, to secure permission to enter Italy without liability for military service." (210 F. 2d at 761.)

While conceding [R. 57] that appellant did not know when he went to Japan that Congress would adopt section 401(c), and that he did not know when he went into the army that he would lose his citizenship, nevertheless the court based its ruling on the theory that appellant "just refrained from protecting his rights as a citizen." [R. 56]. To just what rights the court had reference, does not appear. If it meant a right to be excused, upon representations by the American Consulate on his behalf, from Japanese military service because he was an American citizen, even though he was also a Japanese citizen living in Japan, there is simply no such "right". Not even the United States, which is a government of laws and not of the Kempei Tei, recognizes such a "right." (*Cf.* this court's decision in *Takeguma v. United States,* 156 F. 2d 437). Moreover, even if appealed to, the

American Consulate would make no such representation on appellant's behalf (State Department Publication No. 1316, par. 29, p. 17: ". . . (i)t is not the practice of the (State) Department to make representations in his (a dual citizen's) behalf with a view to his release from the performance of military or other obligations to the foreign country."[14]

Furthermore, the theory that to retain one's United States citizenship, a dual citizen, must, in effect, "elect" between one and the other, is contrary to law (*Yasui v. United States,* 320 U.S. 115; *Mandoli v. Acheson,* 344 U.S. 133).

The third element of the trial court's reasoning is that it did not believe appellant's testimony [R. 55, 56]; that it was "ridiculous" [R. 56]. This element of the case bears close resemblance to the trial court's view in *Gonzales v. Landon.* There, too, the trial court said [R. 32 of Record in *Gonzales v. Landon,* No. 111, Oct. Term, 1955 before the Supreme Court] "I don't believe his testimony" and "I don't see how such foolish statements can be made." [*Ibid.,* p. 33.]

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[14]That the court was of the erroneous view that the appellant could, or the American Consulate would, do something about getting out of military service, is seen from these questions asked by the court [R. 48]:

> "The Court: So, even though you were a United States citizen you made no effort at all to find out whether you could get out of serving in the Japanese army when you didn't want to serve in the Japanese army? They could force you to even though you didn't want to? They could force an American citizen to serve in the Army?
>
> ". . .
>
> "The Court: And the you believed that as an American citizen that Japan could force an American citizen into the army and there wasn't anything that you could do about it, is that right? . . ."

It is not clear as to just what part of appellant's testimony the trial court did not "believe." It will be recalled that all the evidence in the case, both oral and documentary, was adduced by appellant. Thus the trial court accepted at least part of appellant's testimony. Thus the trial court believed appellant when he testified (1) that he was born in the United States [R. 10]; (2) that he claimed permanent residence in Los Angeles; (*ibid.*) (3) that he went to Japan in August 1939 [R. 11]; (4) that he was drafted into the Japanese Army [R. 24, 56];[14a] (5) that he applied at the American Consulate at Yokohama for an American passport to return to the United States but was denied on the ground that he had expatriated himself [R. 12].

What, then, was it that the court did not believe? During its oral opinion, the court said [R. 55-56]:

> "How ridiculous for me to believe his story that in the summer of 1940, when he was notified to report, that for a year he didn't do anything to leave Japan and didn't make any effort to leave Japan . . ."

As the *Lehmann* case has made clear (and it is noted that the Government did not even seek review) the view of the law suggested by this statement is erroneous. And as the Supreme Court has made clear in *Mandoli,* there is not requirement that appellant leave or try to leave the country. Indeed, in *Monaco,* the appellant there, not only did not leave Italy, but actually went there after having been warned by the State Department that he would be subject to military service and not to go without making

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[14a]The court admitted into evidence [R. 24] the stipulation as to the Japanese military law which showed that a violation of a conscription order was a crime, punishable by imprisonment [R. 23].

sure that he could enter Italy without such liability. But more than that—what did the trial court mean? Was it suggesting, contrary to the evidence, that appellant did try to leave Japan? Certainly this cannot be so because in its findings [V; R. 11] it found that appellant made no effort to return to the United States. What, then, did the trial court disbelieve? That there was a Kempei Tei in Japan [R. 37, 49]? That appellant feared what the Kempei Tei might do if he failed to obey the law [R. 37, 49]? That the military controlled the Japanese government and that even high officials were killed in their homes [R. 37]? No answer to these questions is apparent.

But the trial court did more than simply disbelieve appellant as to some part of his testimony. The court actually and affirmatively supplied evidence, none of which is in the record, and some of which is directly contrary thereto. Thus the trial court said:

> [R. 55]: "(H)e (appellant) *knew* he was registered over there (Japan) in the family register." (Italics added.)
>
> [R. 58]: "(H)e *testifies* that he knew, that he was registered in the family register over there." (Italics added.)

Though immaterial, it may be true that appellant knew he was registered in the family register in Japan. However, there is nothing in the record to support this evidentiary finding by the court.

The court further said [R. 58]:

> "He knew he was going to be drafted."

This view of the evidence the court incorporated in its formal findings [III; R. 11]. But the evidence is just

to the contrary as seen from this question and answer on cross-examination [R. 25]:

> "Q. And you knew, did you not, Mr. Nishikawa, that if you went to Japan you were likely to be drafted in the Japanese army; is that correct?"
>
> ". . .
>
> "The Witness: No, sir."

Even if, despite that there was no reason, this answer was not believed, it furnishes no basis, there being no other evidence on the matter in the case, for affirmatively finding the contrary as the fact.

Admittedly, there is law to the effect that a trial court is not bound, under all circumstances, to accept the uncontradicted testimony of a witness. (*Quock Ting v. United States,* 140 U.S. 417, 420, 35 L. Ed. 501, 502). But the decision not to so credit the witness must be a judicial, not an arbitrary, one, and, unless there is some inherent improbability, or contradiction, or omission or some other substantial reason for doubting the witness' sincerity, the general rule that the court is bound by the uncontradicted testimony, must prevail. (*Ibid.*) There is none of these exceptional circumstances here. Moreover, not only is there no contradiction of appellant's testimony, but there is actual corroboration in the record in the form of the Japanese Military Service Law [R. 22-23]. Add to this the facts, of which judicial notice may be taken (see footnotes 6 and 11, *supra*), even if there were a balance, the weight is thrown overwhelmingly in favor of appellant. Certainly the record here does not justify the court in supplying facts which are not here. (*Cf. Mar Gong v. Brownell,* 209 F. 2d 448, 452, fn. 7.)

The gravaman of the court's error in finding the ultimate fact [III, R. 12] that appellant's entry and service in the Japanese Armed Forces was his free and voluntary act, is not that the trial court did not believe appellant, but rather the court's erroneous view of the law as to what is required of a dual national in order to avoid expatriation, coupled with an erroneous view as to what he could do. The theme of "sins of omission" runs clear through the trial court's oral opinion. Thus, in distinguishing this case from a Nisei who had gone to Japan when he was very young, the court said [R. 55]: "Of course, there wasn't anything he (such a Nisei) could do. There was no way he cauld leave Japan. He was drafted. He had no choice. He went into the service or he went to jail." Thus intimating that if appellant did not go into the service, he would not go to jail, and that there was a duty to risk same in any event. Again, the court said [R. 56]: "He just refrained from protecting his rights as a citizen" and *therefore,* "(H)is service could not be considered involuntary" [R. 57]. Aside from the fact that this demonstrates the court's erroneous view of the law as to where lies the burden of proof on the voluntariness issues (discussed above) these excerpts also demonstrate an erroneous view as to the duty of a dual national, in order to avoid expatriation, to fail to omit, but to do. (*Mandoli v. Acheson,* 344 U.S. 133; *Lehmann v. Acheson,* 206 F. 2d 592 (C.A. 3, 1953).)

Despite the circumstances under which appellant was drafted, the decision below violates the rule that "The law does not exact a crown of martyrdom as a condition of retaining citizenship." (*Acheson v. Maenza,* 202 F. 2d 453, 459 (C.A. D.C. 1954).) The courts have re-

jected "the adoption of a Spartan standard by which to determine whether the appellant acted voluntarily." (*Mendelsohn v. Dulles,* 207 F. 2d 37, 39 (C.A. D.C. 1953).) To paraphrase *Podea v. Acheson,* 179 F. 2d 306, 309 (C.A. 2, 1950), appellant "never voluntarily expatriated himself . . . by serving in the (Japanese) army. (This) step (was) required by the situation in which he found himself, . . ." This court, as well as the trial courts of this circuit, are in accord. (*Acheson v. Murakami,* 176 F. 2d 953; *McGrath v. Abo,* 186 F. 2d 766; *Takehara v. Dulles,* 205 F. 2d 560; *Fukumoto v. Dulles,* 216 F. 2d 553; *Ishikawa v. Acheson,* 85 F. Supp. 1 (D.C. Haw., 1949); *Kato v. Acheson,* 94 F. Supp. 415 (D.C. S.D. Cal., 1950); *Morizumi v. Acheson,* 101 F. Supp. 976 (D.C. N.D. Cal., 1951); *Murata v. Dulles,* 111 F. Supp. 306 (D.C. Haw., 1953); *Yoshida v. Dulles,* 116 F. Supp. 618 (D.C. D. Haw., 1954); *Serizawa v. Dulles,* 134 F. Supp. 713 (D.C. N.D. Cal., 1955); *Okada v. Dulles,* 134 F. Supp. 183 (D.C. N.D. Cal., 1955); *Namba v. Dulles,* 134 F. Supp. 633 (D.C. N.D. Cal.); Contra: *Kondo v. Acheson,* 98 F. Supp. 884 (D.C. S.D. Cal., 1951); *Hamamoto v. Acheson,* 98 F. Supp. 904 (D.C. S.D. Cal., 1951).)

The conclusion of the court below that appellant went to Japan wanting to get into the Japanese Army [R. 56] is just contrary to that urged (successfully) by the Government in *Kawakita v. United States,* 343 U.S. 717, where the shoe was on the other foot and the Government won out in contending in a treason case that appellant did not lose his United States citizenship, but where appellant there, also went to Japan during a time of "cold" war between Japan and the United States [R. 46].

See, also, *Yoshida v. Dulles,* 116 F. Supp. 618, 620 (D.C. Haw., 1954), where plaintiff there went at a time (April, 1941) when the war was even "colder" or 'hotter," depending upon one's view of those terms.

Upon a view of the whole case, we submit, the trial court's finding that appellant acted voluntarily is "clear error." (*Acheson v. Murakami,* 176 F. 2d 953, 959; accord: *Fukumoto v. Dulles,* 216 F. 2d 553, 555, 556.)

We believe this case presents a situation where there is no evidence in the record to support the trial court's finding that appellant acted voluntarily, and hence must be reversed under the doctrine of the *Fukumoto* case, *supra.* But even if we are wrong, and, somehow, it is claimed that there is evidence in the record to support the finding, nevertheless we believe the finding is clearly erroneous and that the principle of *United States v. United States Gypsum Co.* (333 U.S. 365, applies. The court there said 333 U.S. at 395):

> ". . . a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

This is particularly true in this kind of a case in light of the Supreme Court's ruling in *Gonzales v. Landon,* 24 L.W. 3164, and the admonition by that court in *Schneiderman v. United States,* 320 U.S. 118, 122, 63 S. Ct. 1333, 1335, 87 L. Ed. 1796, where it was stated that in a proceeding to denaturalize a citizen "the facts and the law should be construed as far as is reasonable in favor of the citizen." This court follows that principle. (*Fujii v. Dulles,* 224 F. 2d 906; *Suda v. Dulles,*

224 F. 2d 908.) See also, *Bergmann v. United States,* 144 F. 2d 34, 37, 38, where this court said:

> ". . . The Supreme Court of the United States . . . in the Baumgartner case, *supra,* . . . went to great pains to distinguish the differences in consideration of the usual case and one touching the civil rights of a citizen wherein the proof, to prevail against the citizen, must be clear, unequivocal, and convincing. . . ."

II.

Section 401(c) of the Nationality Act of 1940 (8 U. S. C. 801(c)) Is Unconstitutional.

Preliminary Statement.

The court below [R. 59] ruled that Section 401(c) is constitutional. We believe, however, that the constitutional questions need not be reached in this case because a reversal should be forthcoming under the argument made in Point I, *supra.* (See *Gonzales v. Landon,* 24 L.W. 3164.) However, in the event the court disagrees, we present the argument on constitutionality.

Appellant is aware that this court has apparently upheld the constitutionality of subsection (j) of Section 401 (now 8 U. S. C. 1481). (*Gonzales v. Landon,* 215 F. 2d 955, 957, revd. Dec. 12, 1955, ... U.S. ....., 24 L.W. 3164; *Vidales v. Brownell,* 217 F. 2d 136, 138.) However, appellant feels justified in arguing the point to this court for at least three reasons.

(1) A reasonable deduction from the Supreme Court's granting certiorari in the *Gonzales* case was that it was doing so on the constitutional issue raised in the case. This was so, not only from the emphasis which was placed upon the constitutional point in the petition for

writ of certiorari, but also because the factual issue, from the standpoint of petitioner, seemed weak when compared with the cogency of the constitutional argument.

The Supreme Court's action in reversing on the factual point, thus demonstrating the correctness of appellant's argument under Point I of this brief, does not detract from the gravity of the constitutional question. We believe the constitutional question to be of the greatest consequence and one which should be re-examined by this court.

(2) In both the *Gonzales* and *Vidales* cases, this court disposed of the constitutional issue without discussion and by single sentence statements. We respectfully urge that, in the light of the grave substance of the question and because a number of cases are now before the court in which the question has been raised, this court may want to reconsider the matter in the light of the arguments now raised.[15]

(3) While argued under the general topic of constitutionality, appellant's argument under A, below, is in reality an argument designed, in accordance with sound judicial practice, to avoid reaching the constitutional point by so interpreting the statute as not to apply to the facts of this case.

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[15]The fact that a different subsection of Section 401 is involved here does, of course, lend weight to the propriety of appellant arguing the constitutional point here. While some writers have urged a constitutional distinction between various subsections of 401 (see Brief, Amicus Curias, of the American Civil Liberties Union in the *Gonzales* case before the Supreme Court), we believe the issue goes deeper and touches the very power of Congrss to impose loss of citizenship against the knowledge and consent of a native born citizen.

A. Section 401(c) Should Not Be Interpreted to Apply to the Facts of This Case.

The circumstances under which appellant served in the Japanese Army are that he was a dual citizen of that country and this, and was drafted pursuant to the law of Japan in which he was at the time residing. In other words, he obeyed the law of the country in which he found himself and of which he was a citizen. By virtue of the principles set forth in the cases dicussed below, both by way of persuasive, if not, indeed, actually binding, precedent, and in order to avoid meeting the constitutional question, section 401(c) should not be interpreted to compel expatriation.

In *Kawakita v. United States,* 343 U.S. 717, 723, 725, the court said:

> ". . . He (Kawakita) had a dual nationality, a status long recognized in the law . . . The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other . . .
>
> "As we have said, dual citizenship presupposes rights of citizenship in each country. It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other . . ."

Lehmann v. Acheson, 206 F. 2d 592 (C.A. 3, 1953), involved conscription into the Swiss Army of an American citizen who also had Swiss citizenship. Said the court, after setting out the quotation from *Kawakita, supra:*

> "Lehmann's actions were certainly within the periphery of the principles stated. As a Swiss citizen he was required to submit to its conscription laws and that apart from the factor that he would have been subjected to punishment had he done otherwise. We can see nothing in the record which would possibly justify a finding that Lehmann did aught but what was obligatory upon him by virtue of his dual citizenship under the laws of Switzerland . . ." (206 F. 2d at 598.)

In *Okimura v. Acheson,* 111 F. Supp. 303, 305 (D.C. Haw., 1953), the court, again after referring to *Kawakita,* said:

> ". . . Being a citizen of Japan as well as of the United States, but living in Japan, the plaintiff was subject to and under compulsion and obligation to comply with the Japanese laws. His complying with the Japanese conscription law and voting in the general elections of Japan were acts commensurate with those of Japanese citizens living in Japan. Without more, these acts cannot amount to renunciation of United States citizenship acquired by reason of birth."

These cases demonstrate, together with the Supreme Court's decision in *Mandoli v. Acheson,* 344 U.S. 133, that merely obeying the law of a country in which one resides, when coupled with the fact that the person has the citizenship of that country,[16] does not amount to expatriation from the citizenship of the country in which

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[16]We do not further complicate the problem by discussing what might be the situation of one who does not have dual citizenship in a foreign country in which he lives and obeying the law of that country, such as paying taxes, registering as a resident, obeying traffic laws, etc.

he is not present at the moment. To hold otherwise—to hold that dual nationality does exist, but at the same time to hold that the exercise of that dual nationality imposes loss of it—is arbitrary and unreasonable, and hence, we submit, a denial of due process under the Fifth Amendment.

We have previously called to the attention of this court the case of *Takeguma v. United States,* 156 F. 2d 437 (C.C.A. 9, 1946), wherein this court held that even a Nisei who had expatriated himself from United States citizenship under 8 U. S. C. 801(i) was not excused from the draft laws of this country. How, then, is it commensurate with due process—with our orderly concept of justice—to interpret section 401(c) so as to impose loss of citizenship in the instant case?[17]

If appellant's argument here is not accepted, then the constitutional issue is squarely presented, and the question is whether Congress has the power, under the Fifth and Fourteenth Amendments, to impose loss of citizenship on a native-born citizen, against his will and consent and without his knowledge of the consequences of his acts.

To this question we now turn.

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[17]The *Takeguma* decision was rendered before this court's decisions in *Acheson v. Murakami,* 176 F. 2d 953 and *McGrath v. Abo,* 186 F. 2d 766, and did not deal with the question of the validity of the renunciation.

B. Section 401(c) Is Unconstitutional on Its Face and as Applied.

(1) Preliminary Statement.

The bald and undenied effect of the compulsory imposition of loss of citizenship under section 401(c) is that Congress is taking away that which the Constitution has given.

Unlike the power of Congress, pursuant to Article I, Section 8, Clause 4, to condition the grant of naturalization (*cf. Lapides v. Clark,* 176 F. 2d 619, cert. den. 338 U.S. 860, reh. den. 338 U.S. 888), Congress has no such power, absent consent, to take away that which the Constitution grants a native-born citizen.

Appellant is a citizen of the United States, not by grace of Congress, nor by its Act. He is a citizen by virtue of the United States Constitution (Fourteenth Amendment). A constitutional right which the *Constitution* and not *Congress,* grants him, may not be taken away from him involuntarily. Article VI, Section 2 of the Constitution provides that "(t)his Constitution and the laws of the United States made in pursuance thereof . . . (are) the supreme law of the land." It can scarcely be said that a law which takes *away* citizenship which has been *granted* by the Constitution is a law made *in pursuance* of that Constitution. On the contrary, such an act is in direct derogation thereof.

In *Dos Reis v. Nicolls,* 161 F. 2d 860 (C.C.A. 1, 1947), the court discusses the constitutional problem here involved (161 F. 2d at 862) and expresses doubt as to the validity of such legislation, but does not reach the question because it construed Section 401(c) in such a way as to avoid it. However, that court did recognize

that expatriation cannot be effected unless the act performed or condition entered into is performed voluntarily "with notice of the consequences." And that court quoted from *Mackenzie v. Hare,* 239 U.S. 299, 311, that

> "a change in citizenship cannot be arbitrarily imposed, that is imposed without the concurrence of the citizen."

Holding directly that *Congress* has no authority to destroy, diminish, or dilute the *United States citizenship conferred by the Fourteenth Amendment to the Constitution of the United States,* is *United States v. Wong Kim Ark,* 169 U.S. 649. In that case the Court declared (at p. 703):

> ". . . *The power of naturalization, vested in Congress* by the Constitution, *is a power to confer citizenship,* not a power to take it away." (Italics added.)

(2) The Right of Expatriation Is Not to Be Equated With the Penalty of Expatriation.

It is clear that a United States citizen may not renounce his citizenship without the consent of the Sovereign.

In *Shanks v. Dupont,* 3 Pet. (U.S.) 242, 246, this court said:

> "The general doctrine is, that no persons can, by any act of their own, *without the consent of the government,* put off their allegiance and become aliens." (Italics added.)

Accord:

> *Murray v. The Schooner Charming Betsy,* 2 Cranch. (U.S.) 64, 120.

This is consistent with what the text writers have said on the subject.

In Getty's *The Law of Citizenship in the United States* (Univ. of Chicago Press, 1934), at page 160, this explanation is made:

> ". . . The right of an individual to terminate his native allegiance without the consent of his native country has been the subject of prolonged controversy and disagreement among the states of the world. International law recognizes that each state decides for itself whether or not expatriation is permissible. At present there seems to be no agreement as to the existence of a 'right of expatriation.' Some states have indicated a recognition of the doctrine of voluntary expatriation under certain conditions, as specified in bilateral treaties. Other states recognize the right unconditionally, while still others do not permit the expatriation of their citizens except by special consent . . ."

Dutcher in his article, *The Right of Expatriation,* 11 A. L. R. 447, 474, exhaustively reviews the subject and says:

> "The whole body of Federal law . . . announces with greater or less distinctness that a citizen of the United States cannot absolve himself from his allegiance thereto without some law of the United States permitting him so to do. Nor does the act of 1868 change the rule."

Swift, *A System of the Laws of the State of Connecticut* (Windham, Conn., 1795-96, Vol. I, p. 164), says:

> "Natural allegiance is the perpetual obligation to government binding on all mankind. It is a duty which they owe and which they can never renounce and disclaim, *without the consent and concurrence of the supreme power of the state.*" (Italics added.)

Blackstone put it this way:

> "Allegiance is the tie, or *ligamen,* which binds the subject to the King, in return for that protection which the King affords the subject . . .
>
> ". . . (T)his natural *allegiance* . . . *cannot be devested without the concurrent act of that prince to whom it was first due.*" (Second italics added.) (I Blackstone, Commentaries, 367 *et seq.*)

Hence, it became necessary for Congress in 1868 to pass legislation giving such consent. And it did so in eloquent language. (R. S. 1999; 8 U. S. C. (1946 Ed.) 800.) But even today (8 U. S. C. 1483), Congress has withheld consent to expatriation in certain cases. (*Cf. In re Grant,* 289 Fed. 814 (D.C. S.D. Cal., 1923; *United States v. Kuwabara,* 56 F. Supp. 716 (D.C. N.D. Cal., 1944).)

One of the most recent examples of the necessity for governmental consent before a citizen can throw off the mantle of citizenship occurred also during World War II when Congress enacted 8 U. S. C. 801(i) (c. 368, Sec. 1, 58 Stat. 677) with reference to the American-born Japanese who had been evacuated from the Pacific Coast and were held in camps by the United States Government. An account of this is set out by this court in *Acheson v. Murakami,* 176 F. 2d 953, 962 (C.C.A. 9, 1949), (Finding 19).

Also demonstrating the necessity for the consent of the sovereign is *Kawakita v. United States,* 343 U.S. 717 where, in defense to a charge of treason, the defendant contended that he had exercised his "natural and inherent right" to expatriate. This contention was rejected.

If, then, a citizen cannot expatriate himself without the consent of the soverign, the Sovereign cannot, especially because of the constitutional root of native born American citizenship, yank off the mantle from the citizen without his consent, voluntarily entered into with notice of the consequences. United States citizenship is a two-way highway, not a one-way street. Neither the Government may impose its loss nor may the citizen shed it without the consent of the other. This is not new doctrine. As seen, it was recognized as early as Blackstone's time. And see Chief Justice Parsons in *Ainslee v. Martin,* 9 Mass. 454 (1913):

> "Protection and allegiance are reciprocal. The sovereign cannot refuse his protection to any subject, *nor discharge him from his allegiance against his consent:* and he will remain a subject, unless disfranchised as a punishment for some crime." (Italics added.)

It is, of course, accepted law that a person may give up, or "waive" constitutional rights. We concede that the right of citizenship granted and guaranteed by the Fourteenth Amendment would be among those constitutional rights which could be waived.[18] Else, 8 U. S. C. 800 would be meaningless. But it is equally accepted law that such waivers are not to be lightly implied and that before a waiver will be decreed, there must be the exercise of a free and intelligent choice[19] of at least the

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[18]"Expatriation is the voluntary *renunciation or abandonment* of nationality and allegiance." *Perkins v. Elg,* 307 U.S. 325, 334. (Italics added.)

[19]*Cf.* the same rule even when one is *applying* for citizenship. *Moser v. United States,* 341 U.S. 41.

magnitude that is required, for example, for a waiver of the right to counsel,[20] or the right to a jury trial,[21] or the right to freedom from unreasonable search and seizure,[22] or the privilege against self-incrimination.[23] Were it otherwise, Congress would then be taking away *without the consent of the citizen,* a right guaranteed him by the Constitution. Congress can no more do this in regard to citizenship than it can say that a man waives the right to counsel because he voluntarily pleads guilty when he does not know of the right to counsel in the first place (*Rice v. Olsen,* 324 U.S. 786).

In other words, because Congress had the right to and did recognize the right of a citizen to give up his citizenship when he *wanted* so to do, *i.e.,* recognized the "right of expatriation," it had no power to twist that right into a liability and *impose* expatriation where the citizen did not want to give up his birthright.

(3)

CONGRESS HAS HERE EXCEEDED ITS POWER.

Similar legislation (8 U. S. C. 801(c) and (e)) to that involved here was declared unconstitutional by the United States District Court for the District of Hawaii in

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[20]*Johnson v. Zerbst,* 304 U.S. 459, 464; *Glasser v. United States,* 315 U.S. 60, 70; *Gibbs v. Burke,* 337 U.S. 773, 780; *Ureges v. Pa.,* 335 U.S. 437, 441.

[21]*Patton v. United States,* 281 U.S. 276, 312; *Hodges v. Easton,* 106 U.S. 408; *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 393.

[22]*Johnson v. United States,* 333 U.S. 10, 13; *Amos v. United States,* 255 U.S. 313; *United States v. Di Re,* 332 U.S. 581.

[23]*Smith v. United States,* 337 U.S. 137, 150; *Quinn v. United States,* 349 U.S. 155.

Okimura v. Acheson, 99 F. Supp. 587 and *Murata v. Acheson,* 99 F. Supp. 591. Direct appeals were taken to the United States Supreme Court by the Government. That Court did not pass on the issue but remanded the cases to the District Court for specific findings as to the circumstances attending the military service and voting involved (342 U.S. 899 and 900). On remand, the court made the required findings and still held the sections unconstitutional (*Okimura v. Acheson,* 111 F. Supp. 303; *Murata v. Acheson,* 111 F. Supp. 306). That court adhered to these decisions in six later cases.[24] The Government pursued appeals in none of these cases. In the light of this fact, the *Okimura* and *Murata* cases take on additional stature.

In the second *Okimura* case (111 F. Supp. 303), the court pointed out that it adhered to the rationale presented in the first case (99 F. Supp. 587). In that first case the court had said (99 F. Supp. at 589, 590):

> "May Congress divest a native born citizen of his birthright?
>
> ". . .
>
> "The point under discussion does not involve the unquestioned power of Congress to enact naturalization laws and to condition the retention of the status of citizenship so acquired. . . .
>
> ". . .

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[24] *Terada v. Dulles,* 121 F. Supp. 6; *Uesu v. Dulles,* No. 1251; *Kikkawa v. Dulles,* No. 1256; *Hisamoto v. Dulles,* No. 1318; *Tamada v. Dulles,* 1263 and *Igarashi v. Dulles,* No. 1240 (the latter holding 8 801(d) also invalid).

"Too, it may be granted that a native citizen may lose that status by naturalization in a foreign country if the American national complies with the formalities with a specific, as distinguished from constructive, intention to cast off his United States citizenship.

"Our concern is, rather, where in the Constitution is to be found any grant of power—specific or reasonably implied—by which Congress is authorized to divest an American born citizen of his nationality, because, having also Japanese nationality, he served in the Japanese Army or voted in an election in Japan?

"It is the view of this Court that while the Constitution gives the Congress plenary power over citizenship by *naturalization,* it leaves the Congress no power whatsoever to interfere with American citizenship by *birth.*

"The leading case on this subject is United States v. Wong Kim Ark, 1898, 169 U.S. 649, 18 S. Ct. 456, 42 L. Ed. 890. While some of its teachings seem to have been occasionally forgotten or whittled down in recent years, it has never been overruled.

". . .

"Section 800 of Title 8, United States Code Annotated, deals eloquently with the 'right' of expatriation, yet Section 801, applicable alike to native and naturalized citizens, attempts to spell out some ways in which that 'right' may become a liability.

"Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated. Congress has been given control over only one means of *creating* United States citizenship, namely by naturalization. It has the power to create and to condition that

grant of citizenship; but is wholly devoid of any power to destroy citizenship by birth.[25]

We submit that this reasoning represents the correct law. We have previously called attention to the *Wong Kim Ark* case where the Court said (169 U.S. at 703):

> "The 14th Amendment, while it leaves the power of Congress where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right of citizenship."

Moreover, a comparison between the language of the Constitution and the statute in question immediately demonstrates the patent invalidity of 8 U. S. C. 801(c). Thus:

U. S. Constitution 14th Amendment	*8 U. S. C. 801*
"All persons born or naturalized in the United States . . . are citizens of the United States. . . ."	"A person who is a national of the United States shall lose his nationality by: . . ."

Nor does the declaration of Congress in 8 U. S. C. 800 change the situation. Regardless of what may be the rule where an American citizen actually *renounces* his citizenship, there is no basis for saying that Congress has the right to deprive him of his citizenship by the

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[25]By footnote 1, p. 590, the court made this significant statement:

> "This Court is aware that there have been authoritative intimations to the contrary. See Mackenzie v. Hare, 239 U.S. 299, 311-312, 36 S. Ct. 106, 60 L. Ed. 297; Perkins v. Elg, 307 U.S. 325, 329, 59 S. Ct. 884, 83 L. Ed. 1320; and Kawakita v. United States, 9 Cir., 1951, 190 F. 2d 506. But only in the Mackenzie case was the precise Constitutional question here involved squarely presented, and there under vastly different facts."

doing of acts other than actual renunciation, simply because Congress does not like him. The Constitution gives Congress no such right; that body cannot, by a declaration, clothe itself with such power.

The attempt by Congress to say that a person as to whom the Constitution says is a citizen, is not a citizen, is no more valid than would be efforts by Congress to undo any other provision of the Constitution. A few examples, by way of rhetorical questions, will demonstrate the lack of power in Congress to so do:

1. Article I, Section 1, says that Congress shall consist of a Senate and a House of Representatives. May Congress decree that hereafter Congress shall consist of only a Senate?

2. Article I, Section 2, subsection 1, provides that members of the House of Representatives shall be chosen every second year. May Congress provide that hereafter members of the House shall be elected every third year?

3. Article I, Section 2, subsection 4, provides that where there is a vacancy in the House of Representatives from any state, the executive of that state shall fill the vacancy. May Congress provide that in such an instance the executive of that state shall not have the right but that Congress itself shall fill the vacancy?

4. Article I, Section 3, subsection 6, provides that the Senate shall have the sole power to try all impeachments. May Congress provide that the power to try impeachments shall henceforth be given to the House?

5. Article I, Section 3, subsection 7, provides that the judgment in impeachment shall extend only to removal from office and disqualification. May Congress enact that a judgment of impeachment may provide for sending the officer to jail?

6. Article I, Section 6, subsection 1, provides that a Senator or Representative for a speech or debate in either house shall not be questioned in any other place. May Congress provide that a Representative could be called to answer for a speech in the House before a Federal Grand Jury?

7. Article II, Section 1, subsection 1, provides that the President shall hold office for four years. May Congress provide that henceforth he shall only hold office for three years?

8. Article II, Section 2, Clause 1, provides, *inter alia,* that the President shall be the Commander-in-Chief of the Army and Navy, and that he shall have the power to grant pardons save in cases of impeachment. May Congress provide that he shall lose his command or his power to pardon if he engages in acts of which Congress disapproves?

9. Article III, Section 1, provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may establish. May Congress provide that the Supreme Court shall no longer have judicial power if it acts in a manner displeasing to Congress?

10. Article III, Section 3, Clause 1, provides that Congress may admit new states to the Union. May Congress provide that a state once admitted into the union can be ousted therefrom?

11. Article VI, Section 3, provides that no religious test shall be required as a qualification for an office of public trust. May Congress provide that such a qualification be required?

12. The Third Amendment provides that no soldier shall, in time of peace, be quartered in any house without

the consent of the owner. May Congress provide that, in time of peace, soldiers may be quartered in a house without the owner's consent?

13. The Seventeenth Amendment provides that each state shall have two Senators. May Congress provide that a particular bad acting state shall have one or no Senators?

Further examples could, of course, be cited. The point is that citizenship is a specific right which the Constitution and not Congress gives. How, then, can Congress undo what the Constitution does?

Moreover, if Congress can strip away citizenship from persons constitutionally endowed with that status, why cannot it take away lesser rights which go to make up that bundle which we call American Citizenship, such as: the right by trial by jury, to be represented by counsel, to freedom of speech, etc. A familiar maxim is that the greater includes the lesser. Therefore, if Congress can take away the whole of citizenship, it should logically follow that it can take away any part thereof.[26] We believe Congress has no power in either instance. *Cf. Dawson's Lessee v. Godfrey,* 4 Cranch (U.S.) 321, 323: "(A) man can never put off his allegiance, or be deprived of the benefits of it but for a crime."

We submit that in enacting "provisions for *compulsory* expatriation"[27] (italics added) absent consent, Congress has exceeded its delegated powers.

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[26]The fact that these rights may also belong to aliens does not detract from the point. They certainly belong to citizens. See *Galvan v. Press,* 347 U.S. 522, for an example of where aliens have, if anything, less rights than citizens.

[27]The words are those of Government in its brief (p. 49) before the Supreme Court in the *Gonzales* case.

Conclusion.

The judgment below should be reversed with instructions to enter judgment declaring appellant to be a national of the United States.

Respectfully submitted,

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APPENDIX.

Extracts From and/or Comments on Documents Lodged With the Clerk of This Court in Aid of the Court's Taking Judicial Notice of Conditions in Japan at the Time Involved in This Case.

"In 1925, the Ministry of Education issued an ordinance that, at the time, caused some dissention, but that came to be accepted as an integral part of the educational program. This ordinance provided that military officers on active duty should be appointed to give military instructions in all government and public normal, middle, higher, technical and special schools. In the next 15 years, further changes designed to sharpen the educational system into an able instrument of nationalistic policy were made. Regimentation and a hierarchal centralization of power over education were intensified in 1937 and 1941. This system continued until August, 1945." (SCAP, *Education in the New Japan,* p. 6, 16 May 1948.)

"For a long time the average citizen's reaction to the police has been one of extreme fear." (SCAP, *Summation No. 3,* Dec. 1945.)

"Free thought and free expression have been practically unknown in Japan. The police have occupied a dominant control over all phases of Japanese life. In addition to the regular police employed in maintaining law and order, Japan had an extensive network of secret police (Kempeitai) and 'thought police.' The former possessed army authority and the latter authority of the Peace Preservation Act of 1941 and similar enactment on 'thought control.' Together they had been given unlimited power to deal with any signs of unrest or dissatisfaction. Thus the emergence (end of p. 36) of demo-

cratic groups was subjected immediately to ruthless terrorization and brutality. The press and radio have served as the mouthpiece of government policy." (SCAP, *Summation No. 1,* Sept., Oct. 1946, pp. 36-37.)

"Free thought and speech were completely suppressed by the special types of Japanese police. Ruthless methods prevented the emergency of authentic democratic groups." (*Ibid.,* 33.)

"The Japanese theatre was in a condition of stagnation. Expression of new ideas was not permitted and plays were either propagandistic or escapist in nature. Troupes touring the Country presented nothing but obviously official materials." (*Ibid.,* 148.)

"In the course of 20 years, Japanese militarists had constructed effective machinery for controlling the speech, thoughts, and movements of the people. This was accomplished through legislation, the police, censorship regulations, centralized control over newsprint and ownership of radio broadcasting facilities." (*Ibid.,* 163.)

"In the later years, preceding and during the war, the most vicious regimentation of the people came through the police force of Japan, which was also under the Home Ministry. By both legal and extra-legal methods the police eliminated dissident elements, frequently throwing people in jail who were considered troublesome and keeping them there for years without lodging specific charges." (SCAP, *Two Years of Occupation,* p. 14.)

"Most objectionable of these were, of course, the supervision and restriction of the people in the exercise of their fundamental rights under the so-called Peace Preservation Law. For this purpose there were 'Thought Police' or 'Special Higher Police' units in the municipalities, pre-

fectures and in the Home Ministry. The activities of these bodies were supplemented by the 'Protection and Surveillance Commission' and 'Protection and Surveillance Stations' in the procuratorial system under the Ministry of Justice." (SCAP, *A Brief Progress Report on the Political Reorientation of Japan,* p. 7.)

"The great masses of the people, docile by training and terrorized by fear, were without a voice in the determination of their own affairs." (SCAP, *Two Years of Occupation,* pp. 13-15.)

"(Nisei, whether in Japan or long or short time) were under surveillance (by the police) by reason of their identity and association." (Togosaki Deposition, p. 10.)

"Conscription or government notification is final to which no one can appeal. There is no process, no media, no channel by which an appeal can be made." (*Ibid.,* pp. 26-27.)

> "There was fear . . . among (the draftees) that . . . they would be shot or killed . . . if they didn't obey summons." (*Ibid.,* p. 27.)

This court commented on several features from the Murayama deposition in *Fukumoto v. Dulles* 216 F. 2d at 555.

After the Manchurian incident, no one refused military conscription. (Matsuki Deposition, pp. 15, 17.) One couldn't refuse conscription. (*Ibid.,* pp. 18, 21.)